IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 803 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE D.C.SRIVASTAVA sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO No

2. To be referred to the Reporter or not? No : No

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO No

5. Whether it is to be circulated to the Civil Judge? No : No

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CHINUBHAI P SHAH

Versus

SHAH BALDEVDAS ALIAS BALVANTRAY MOHANLAL

Appearance:

MR SB VAKIL for Petitioner

MR GS HARIBHAKTI for Respondent No. 1

CORAM : MR.JUSTICE D.C.SRIVASTAVA

Date of decision: 18/08/2000

ORAL JUDGEMENT

1. This is landlord's revision under Section 29(2) of the Bombay Rent Act against concurrent judgments and Decrees of the trial Court and the lower Appellate Court dismissing the suit of the landlord revisionist for

eviction of the defendant - respondent.

2. Inspite of revision of list thrice none appeared from the side of the respondent. Shri S.B. Vakil, learned Counsel for revisionist was heard and the Judgments of the two courts below were examined.

3. Brief facts are that the jplaintiff - revisionist being landlord of the demised premises let it out to the defendant - respondent on monthly rent of Rs.75/-. It was alleged that the tenant was in arrears of rent for more than six months who was not ready and willing to pay the rent despite service of notice of demand. It was also alleged that the tenant did not use the demised premise for a continuous period of more than six months before institution of the Suit and he had shifted to the new Bungalow situated in Vimal Park Society and he has acquired the same as suitable residence for his accommodation as well as for accommodation of his family members. Another allegation was that the defendant was attempting to sub-let or transfer portion of the demised premises in favour of the third party. It was also alleged that the defendant was causing damage to the suit property and was acting contrary to the provisions of Section 108(4) of the Transfer of Property Act and Section 13(1)(a) of the Bombay Rent Act. On these grounds the Suit for eviction was filed in which the Decree for arrears of rent amounting to Rs.2162.50 ps. was also claimed.

4. The Suit was resisted by the respondent denying all these allegations. He raised dispute of standard rent and disputed that the standard rent could be Rs.75/p.m. He pleaded that he had deposited the entire arrears of rent in Court as directed by the Court below. Other allegations regarding non-user of the property for a period exceeding six months before institution of the Suit, acquiring alternative suitable residence in Vimal Park Society were also denied, so also the allegation of sub-letting and causing damage to the suit property. The respondent also moved an application for fixation of standard rent.

5. The Standard rent was fixed by the trial Court at Rs.60/- p.m. Both the Courts below found that the plaintiff revisionist failed in establishing any ground for passing decree for eviction against the respondent. Consequently the suit was dismissed for eviction of the tenant - respondent.

6. Being aggrieved the landlord preferred Appeal

which too was dismissed, hence this Revision.

7. Shri S.B.Vakil, learned Counsel for the revisionist did not challenge the finding of the Court below regarding standard rent fixed by the trial Court at Rs.60/- p.m. He further stated that he is challenging the finding of the lower Appellate Court on Point Nos. IV to VI formulated in the Judgment of the Lower Appellate Court. Thus, in effect the findings of the two Courts below regarding sub-letting, tenant being in arrears of rent exceeding six months and his unwillingness to pay the same and tenant acting in contravention of the provision of Section 108(O) of the Transfer of Property Act were not challenged in this Revision.

8. Shri S.B.Vakil, learned Counsel for the revisionist - landlord has vehementally contended that even bare perusal of the Judgment of the lower Appellate Court will indicate that it is a perverse judgment which is based on total misreading of evidence on record and drawing inference and presumption not emerging from the evidence on record. Consequently he has urged that even though it is a case of concurrent findings on record by the two Courts below it is a fit case where the revisional interference is required inasmuch as the Judgments of the two Courts below are perverse, especially on the point that the tenant had not used the disputed accommodation for a period of more than six months immediately preceeding the institution of the Suit and that the tenant has acquired alternative suitable accommodation for himself as well as for his family members. No doubt this is a case of concurrent findings recorded by the two Courts below, but on that ground alone the Revision can not be dismissed. Even in cases of concurrent findings recorded by the two Courts below the revisional court has to see whether the Judgments under challenge are in accordance with law and whether such judgments are perverse or based upon proper appreciation of evidence on record. A Judgment is said to be perverse which is based upon presumption and inference drawn which can hardly be drawn from the evidence on record. Likewise the Judgment can be said to be perverse when findings are recorded in such a manner which no reasonable man can expect from the evidence on record. Likewise the Judgment is said to be perverse when it is based on total misreading of evidence, what to say, of misappreciation of evidence.

9. After examining the Judgment of the lower Appellate Court I find that the lower Appellate Court has

over-looked the material evidence coming on record and has drawn inference and conclusion which no reasonable man could draw on such evidence and circumstances emerging from the evidence on record.

10. So far as the allegation of the landlord that the tenant has not used the suit accommodation for a period of six months and more preceeding the institution of the Suit is concerned even from the Judgment of the lower Appellate Court said inference can be drawn that the evidence was misread and misappreciated and circumstances which go to show that the disputed premises was not used by the tenant for the statutory period were totally over-looked by the lower Appellate Court.

11. It is in evidence on record that a Bungalow has been constructed in Vimal Park Society. There is controversy whether it was constructed by the tenant or by his son. It has been argued by Shri Vakil that the son of the tenant is working in Bank and he was said to have raised loan of Rs.50,000/- whereas the cost of construction of the Bungalow comes to Rs.75,000/- and there has been no explanation from where the son of the tenant having meagre salary could save the amount of Rs.25,000/- for raising the construction. It is further clear from the evidence on record that the tenant has actually shifted to the new Bungalow known as "Vimal Park Bungalow". It consists of two floors in which there are five to six rooms. There is thus sufficient accommodation in this Bungalow not to accommodate the son of the tenant who is employed in a Bank drawing salary of Rs.2700/- per month, but is also sufficient to accommodate the entire family of the tenant - respondent. Acquisition of alternative sufficient accommodation and non-user of the premises by the tenant for a continuous period of six months and more preceeding institution of the Suit on the facts and circumstances of the case go together and cannot be seperated.

12. It is mentioned in the Judgment of the Lower Appellate Court that one son of the tenant Pritesh is serving in Civil Court, Nadiad and his mother has been nominated in the Provident Fund Account of Pritesh. The address of the mother of Pritesh has been mentioned as "Vimal Park Society". If the tenant along with his family was residing in demised premises there was no occasion and no reason for the son of the tenant to mention the address of his mother in the Provident Fund Nomination form as Vimal Park Society Bungalow which is said to have been constructed by another son of the tenant. Even if we ignore to decide the controversy as

to who had actually constructed the said Bungalow yet it emerges from the evidence on record that the disputed premises was not used by the tenant for more than six months before institution of the Suit. The Suit was instituted on 13.2.1981. The second circumstance is that the summonses of the Suit were served on the defendant at the address of Vimal Park Society Bungalow. If the defendant was not residing in the Vimal Park Bungalow the summons could not be served on that address. The landlord has taken risk of giving address of the tenant at Vimal Park Bungalow. In case the defendant was not residing there the summons could have been returned back with the endorsement that the defendant is not residing at the Vimal Park Bungalow. The third circumstance that the son of the tenant has given address as Vimal Park Bungalow in the college form submitted to the Commerce and Law College, Nadiad. There was again no reason for other son of the tenant to give address in the college form if they were actually residing in the demised premises.

13. The next circumstance is that Pritesh, younger son of the tenant has mentioned the address of Vimal Park Bungalow in his Service Book. It is again difficult to accept that if Pritesh was not actually residing in Vimal Park Bungalow he would not have given address of Vimal Park Bungalow in the service record. Service record of an employee is an important document in which complete and correct information has to be given by the employee.

14. The next circumstance is that the Commissioner was appointed to visit the demised premise twice. One panchnama Ex.36 was prepared by the Commissioner on 14.2.1981 and the other Ex.37 was prepared subsequently. The lower Appellate Court itself observed that from these two panchnamas it was clear that the suit house was closed for some time. In the panchnama it was mentioned that Tulsi plants were found to have dried up. The earth was also found to have dried up. There was dust in the kitchen and in the household material. The Commissioner also visited Vimal Park Bungalow and prepared panchnama Ex.39 on 15.2.1981 and found that the said Bungalow was in running condition. Curious explanation has been given by the lower Appellate Court to all these observations in the panchnamas that these factual observations by the Commissioner do not show that the premise was actually closed. From his personal knowledge the Appellate Judge observed that even if the house is closed for a week the dust is likely to accumulate. Again peculiar explanation was given by the lower Appellate Court regarding dried up tulsi plant which can hardly be expected from a

reasonable man.

15. In addition to the factual observations made by the Commissioner a glaring fact emerged from the evidence on record that for a period of about 4 years there has been no consumption of electricity in the disputed premise by the tenant. It is difficult to believe that in a place like Nadiad the tenant would have been continuously residing without electricity. There is no evidence on record that the tenant was using kerosene or LP Gas stove lamp for light and for preparing food. The explanation of the tenant has been that the sub-meter was disconnected since 4 to 5 years hence it was not possible to consume electricity. This explanation is also hardly convincing. No complaint was lodged by the tenant with the electricity Board that the landlord had illegally disconnected sub-meter. There is clear and categorical admission of the defendant that from 1981 to 1983 he had not consumed electricity and the meter was not running. Even when the Commissioner prepared Panchnama he found that the sub-meter was not running in the demised premise.

16. There is further evidence in the nature of aforesaid reports prepared by Malaria Inspector, who found the demised premise closed from 30.12.1980 to 30.4.1981 and also from 24.4.1981 to 6.10.1981, 5.12.1982 to 8.12.1982 and from 11.5.1983 onwards. This evidence was also rejected by the Lower Appellate Court on untenable ground. As indicated earlier the Suit was instituted on 13.2.1981. If the Malaria Inspector found the premise closed at the first instance from 30.12.1980 it is apparently established that the premise was not used by the tenant for residential purpose for a period exceeding six months before institution of Suit.

17. Another circumstance emerging from the evidence on record is that the defendant had changed the address of the Suit property and has received his letters at Vimal Park Society address. For this the plaintiff examined two witnesses, namely, Ketanbhai Naranbhai who has stated that the defendant is residing in Vimal Park Society since last 5 to 7 years and another witness Rajendra stated that the defendant is residing in Vimal Park Society after 1978. The statements of these two witnesses were rejected by the lower Appellate Court on two grounds. The first was that they are friends of the son of the plaintiff and the second is that these witnesses did not receive any corroboration from any independent witness. Both these grounds are unacceptable. At the most these two witnesses can be

said to be interested witnesses, but merely because certain witnesses are interested their testimony cannot be per se rejected being doubtful. Unless these witnesses were shettered in cross examination their testimony could not be disbelieved on the ground of interestedness. It was not specifically held by the Lower Appellate Court that these witnesses were interested or highly interested witnesses with the case by the plaintiff landlord. So far as the plea of corrboration is concerned the lower Appellate Court lost sight of the documentary evidence referred to above which corroborated these two witnesses that the defendant tenant was not residing in the disputed premise over more than the statutory period. Consequently the Lower Appellate Court has patently misread the evidence of these two witnesses. Misreading of evidence is certainly a ground for interference in such revision.

18. The reasoning recorded by the lower Appellate Court for ignoring the reports prepared by the Commissioner in Para : 20 of the Judgment are hardly convincing and acceptable. A very important observation was made by the Commissioner that two Calenders were found in the demised premise and pages after November, 1979 from those calenders were not torn off. This fact also gives clear indication that the premise was not used for residential purpose by the tenant since November, 1979 which corroborates the evidence of plaintiff and his two witnesses. Explanation of the Appellate Court on this point is also funny that it is not unusual that some person preserves attractive pictures in the calender, but the Lower Appellate Court had not observed, as a matter of fact, that any of these two calenders in the month of November, 1979 had attractive pictures. Consequently such self styled explanation of the lower Appellate Court cannot be accepted.

19. For the reasons given above it is clear that the Judgment of the Lower Appellate Court on its face appears to be perverse hence it cannot be sustained. It is fully established from the evidence on record that the tenant respondent had not used the demised premise for a period exceeding six months and this was sufficient ground for passing the Decree for eviction under Section 13(1)(k) of the Bombay Rent Act. If the decree for eviction could be passed even on one ground it was not necessary to enter into other grounds of eviction raised by the landlord.

20. The question of ownership of the Bungalow in Vimal Park Society is not a matter of adjudication in this revision nor it can be matter of adjudication in the

Suit and the Appeal pending before the Two Courts below. However, in view of the fact that the tenant had not used the disputed premises for a period exceeding six months before institution of the Suit and has conveniently shifted along with his family members, namely, wife and sons to the Vimal Park Society Bungalow it can be said that he has acquired alternative accommodation for his use. The word "acquisition" does not necessarily mean the concept of ownership. Acquisition may be in any form. It is not a case of casual occupation of Vimal Park Society Bungalow, rather the tenant is occupying the said Bungalow along with his wife and sons. Consequently this could also be ground for passing the Decree for eviction. Even if this ground is considered to be a weak ground for eviction then the Decree of eviction under Section 13(1)(k) of the Act can certainly be passed.

21. In the result I am of the opinion that the two Courts below were in obvious error in refusing to grant decree for eviction in favour of the revisionist landlord. The Revision, therefore, succeeds and is hereby allowed. The Judgments and the Decrees of the two Courts below refusing the Decree for eviction of the respondent in favour of the revisionist are hereby set aside. The Suit of the Revisionist for eviction of the respondent from the disputed premise is hereby decreed. The plaintiff's Suit for recovery of arrears of rent from 1.9.1979 till the date of Suit, namely, 13.2.1981 amounting to Rs.1050/- is decreed. The plaintiff shall also get pendentlite future mesne profits at the rate of Rs.60/- per month from the date of the Suit till recovery of possession with costs through-out.

sd/-

Date : August 18, 2000 (D. C. Srivastava, J.)

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